

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THEARDISE K. LOWMAN, SR.,)
Plaintiff,) 8:05cv454
vs.) MEMORANDUM AND ORDER
MICHELLE A. PETERS, et al.,)
Defendants.)

This matter is before the court on the following pending motions: (1) Filing Nos. 7 and 13, the Motions to Dismiss filed by the defendants, D. C. Bradford, III, Justin Eichman, Michelle Peters and the City of Omaha; (2) Filing Nos. 15, 16 and 17, the Motions to Stay and to Extend Time filed by the plaintiff, Theardise K. Lowman, Sr.; and (3) Filing No. 18, the Response to Plaintiff's Motions to Stay and Extend Time filed by Peters and City of Omaha. The plaintiff filed this action while a citizen of Arkansas, although he has since moved to Missouri. He seeks monetary relief from attorneys located in Nebraska for legal malpractice which allegedly occurred during civil rights litigation in Nebraska in 2002.

In their Motions to Dismiss, the defendants ask the court to take judicial notice of Case No. 8:02cv302, the prior litigation in which the alleged professional negligence purportedly occurred. The court can take judicial notice of the filings in that case as the documents are available on the court's CM/ECF electronic filing system. However, insofar as the defendants ask the court to refer to information outside the pleadings in this case, the bases for dismissal would more properly be asserted in the form of motions for summary judgment. In addition, the defendants contend that the appeal of Case No. 8:02cv302 is still pending. However, in February of 2006, the Eighth Circuit Court of

Appeals affirmed the jury verdict in Case No. 8:02cv302 and denied the plaintiff's motion to supplement the record with evidence that was not before the jury. Thus, the Motions to Dismiss in this case appear to be factually outdated at least in some respects.

The defendants' Motions to Dismiss will be denied, without prejudice to reassertion in the form of properly supported motions for summary judgment. In the reasserted summary judgment motions, if the defendants want the court to take judicial notice of filings in Case No. 8:02cv302, they may attach copies of filings from that case to an Index of Evidence and refer to the Index in their brief. They must, of course, serve a copy of such Index and brief on the plaintiff, who is unlikely to have access to the court's CM/ECF system.

The plaintiff's Motions to Stay and to Extend Time are denied as moot. The plaintiff is warned that if a summary judgment motion is filed in the future, the standard period for a response is twenty (20) days. Failure to respond to a motion for summary judgment can cause a case to be dismissed.¹

THEREFORE, IT IS ORDERED:

1. That Filing No. 7, the Motion to Dismiss filed by defendants-D. C. Bradford III and Justin Eichman, is denied;

¹When a defendant moves for summary judgment supported by sworn testimony, a plaintiff cannot simply rely on the complaint. Instead, the plaintiff must offer sworn testimony such as in the form of written statements declared to be true under penalty of perjury or by affidavits or interrogatories or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in any similar writing or documents by the defendant(s). A party opposing summary judgment must demonstrate a genuine issue of material fact for trial. If the plaintiff does not submit evidence in opposition to summary judgment, summary judgment may be granted and the case dismissed.

2. That Filing No. 13, the Motion to Dismiss filed by defendants-Michelle Peters and City of Omaha, is denied;
3. That Filing No. 15, the plaintiff's Motion to Stay, is denied as moot;
4. That Filing No. 16, the plaintiff's Motion to Extend Time, is denied as moot;
5. That Filing No. 17, the plaintiff's Motion To Extend Time, is denied as moot;
6. That Filing No. 18, the Response to Plaintiff's Motions to Stay and Extend Time filed by defendants-Michelle Peters and City of Omaha, is granted in part; as additional delays are to be avoided if possible.

Dated this 10th day of April, 2006.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge